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SPEECH

OF

HON. HENRY WINTER DAVIS,

OF MARYLAND,

AGAINST

THE ADMISSION OF KANSAS

UNDER THE

LECOMPTON CONSITUTION.

DELIVERED IN THE HOUSE OF REPRESENTATIVES, MARCH 30, 1858.

The House having under consideration the bill to admit the State of Kansas into the Union—Mr. HENRY WINTER DAVIS, of Maryland, said:

Mr. CHAIRMAN: The earlier explorers in high Northern latitudes were perplexed at beholding great icebergs mysteriously making their way to the north against current and wind and tide. Philosophers in the closet divined from the strange phenomenon the existence of an under current running counter to that of the surface, that bore them along. The disinterested spectator, Mr. Chairman, of the course of this debate, ignorant of our history for four years, and of who now holds the helm, would find himself similarly perplexed, and perhaps he might surmise a similar solution.

That an administration which professes to be the god-father of "*popular* sovereignty," should oppose the submission of a constitution to the *popular* vote; that an administration which is, in name, Democratic, should propose to impose upon the majority the will of the minority; that an administration elevated to power by the South, against the will of the North, should urge, as the shortest way to accomplish the great purpose of making Kansas a free State, her admission as a slave State; that the administration, which professes anxiety to preserve the peace of the country, should say that the shortest way to restore the broken peace is, not to remove, but to fasten, by irrevocable laws, in the form of a State constitution guarantied by the united power of the country, that hateful oligarchy upon a people whose neck was too tender to bear the weight of their Territorial yoke, which Congress could at any moment alleviate; that these methods should be taken to accomplish these purposes, may well puzzle the speculator in exploring the hidden reasons that drive men thus contrary to what apparent reason—the ordinary method of guiding the Commonwealth, the ordinary propelling powers of the government—would seem to dictate. And possibly, Mr. Chairman, he might not be very far from solving the problem if he were to assume that the question is, not so much how to accomplish the pacification of Kansas, or to make legislation square with the dogma of "*popular sovereignty*," or to secure the right of the people to form their own domestic institutions in their own way, which we are taught to believe is a new revelation of the year of grace eighteen hundred and fifty-four—not so much any of those reasons as to prevent the Administration, which boasted itself the omnipotent pacificator, from being brought to lick the dust, now, ere the termination of the first session of its first Congress—to lick the dust before the will of that majority which it is defying in one of the Territories—before the will of that majority of the people of the United States, against which Mr. Buchanan ascended the Presidential chair, and amid the irreconcilable diversities of opinion of the people who were combined to elevate Mr. Buchanan to the Presidency—but here that men and parties are brought face to face—can no longer coalesce in the policy he would have them pursue.

We are debating the recognition of an independent State.

The Administration produce a piece of parchment with a form of government written on it and a certificate of one John Calhoun, that it is the constitution adopted at Lecompton by a convention of the people of Kansas; and on *this* evidence the President and his friends demand the recognition of the State of Kansas.

We respectfully ask for the proof that the piece of parchment contains the will of the people of Kansas.

We are told the Territorial Legislature took, by law, the sense of the people—and 2,670 voted to call a convention; that 2,200 persons voted, *in all*, for the members of the convention; that the convention, whose journal no one here has seen, voted the constitution; that it was not submitted to the people for their ratification, and that the vote of the 4th of January, of 10,000 against it, is of no legal relevancy to the question before us.

On this state of facts, Mr. Chairman, we are besought, on behalf of the Administration, to vote for the admission of Kansas under the Lecompton constitution for the sake of the *principle* involved. Sir, I confess myself the servant of principle; and I respectfully ask gentlemen what principle they ask me to sanction?

Is it that a minority in a territory constitute the people, and so must make their will the law over the majority? If so, I respectfully dissent from the principle.

Is it that the people of a territory, with or without previous authority of Congress, have a *legal* right themselves to take the initiative, and to lay upon your table a constitution which they are entitled to demand at our hands that we shall accept? If so, then I respectfully dissent from the principle.

Is it, on the part of our Southern friends, that any constitution which may be laid upon our table containing, no matter how put there, a clause sanctioning slavery, is to shut the eye to every other circumstance connected with it, and to drive us to the admission of that people as a State merely because that provision is in the constitution? If so, then I respectfully dissent from the principle.

Is it that they mean that gentlemen may look into the constitution for the purpose of seeing that slavery *is* there, and when they find it there are bound to vote for the admission? If so, then the gentlemen upon the other side of the House, by exactly the same reason, may look into that constitution to see that slavery is there; and, if they think it the more logical conclusion, may vote to refuse admission upon that ground. But as I do not understand the gentlemen on the other side to admit the latter alternative as one fit to be embraced, they will indulge me in the logical consequence of not regarding the former as a proper consideration to weigh at all with me upon the question that is before the House.

That slavery is embraced in that constitution, is certainly, Mr. Chairman, in my opinion, no ground at all for the rejection—no ground at all for any difficulty about admission. If put there by the will of the people, it ought not to weigh with the weight of the dust in the balance upon the question; for to allow that to be a ground of exclusion, while it would be within the legislative discretion of Congress, would be, in my judgment, unwise, tending directly to consequences that all of us are most anxious to avoid, and would exhibit an unsocial disposition in behalf of the majority which might come to such a conclusion, which, whether rightfully or wrongfully, the past history of the nation teaches us only too well will lead to nothing but disastrous civil collisions; which, in their result, if not immediately, will first undermine, and then bring down in ruin, the whole fabric of our liberties.

Then, if these be not the principles which ought to commend themselves to the judgment of a right-judging man, is there any other? Is it that because the Territory has proceeded under a law of a Territorial Legislature, with all the regularity and formality, as the President tells us, that any territory has ever proceeded, we are *bound* to accept what they send to us, blindly and without looking beyond it? Is it the principle of this Government not only that we *may* stop, but that we are *bound* to stop, at what the Territory sends to us? Then, Mr. Chairman, I do not assent to that proposition; and it is to that proposition that I desire chiefly to draw your attention now.

Upon that question, I am freer than most of the gentlemen upon either side of this House. I voted with my Southern friends against the Topeka constitution, being a free constitution formally sent here by the majority of the then inhabitants of the Territory. I am, therefore, free to raise the question whether there is legal authority at the bottom of that constitution now presented to us? They protested against the admission of California because there was no evidence that a majority of its people had assented; because there was no formality of law preceding its constitution; because there were no protections to the ballot-box. I am, therefore, now free to ask those who did protest to join me in inquiring whether there be here legal authority; whether here the ballot-box has been protected; whether here we have the will of the people ascertained in legal form which we not only may accept but which we are bound to accept!

This assumes the validity of the laws of the Territorial Legislature calling the convention, and the proceedings under them in point of law; and that the legal effect of those proceedings is to clothe this parchment with all the attributes of a State constitution, and that we are not entitled to inquire who voted for or against it; how many staid from the polls, or why they did so; nor whether fraud or force have decided the result; but that the legal certificates preclude inquiry into everything beyond.

I respectfully deny the validity in point of law, and further say, that if they were as valid as if authorised by act of Congress they could to no extent exclude the legislative discretion of Congress as to the fitness of recognising the new State.

Mr. Chairman, in my judgment all that is necessary to the admission of a State is a concurrence of the will of the people of a territory and of Congress. Prior to such concurrence there is no State. After that concurrence there is a State. The application of a territory to be admitted as a State is only a petition upon your table—an offer upon their part which we may accept or which we may reject at our pleasure. After that concurrence it has been engrafted into the living body politic of the country, bone of our bone, flesh of our flesh, to share with us for good or evil, to the end of time, the blessings or misfortunes of the Republic—to be severed by nothing except that external violence which shall lop off some living limb of the Republic, or that civil strife which the chief of the Republic is so rashly provoking.

Enabling acts, whether contained in the organic law of the Territory, or in special acts authorizing the formation of a constitution, providing for the formalities of election, the protection of the polls, the expression of the popular will under the forms of law, are only the guaranties that Congress in its wisdom throws around the expression of the popular will. They are only methods of ascertaining that will; and when that will is ascertained, Congress has everything that is indispensable, and all the Territory can supply. The will of Congress to concur with the will of the people is expressed in the act of Congress admitting the State; and it is that concurrence, no matter how ascertained, by what forms, or with the omission of what forms, which makes the distinction, and alone makes the distinction between a Territory of the United States and a State of the United States.

There is no such thing in our system as an incipient State; a State whose federal relations are undefined, a State of uncertain federal relations, as Mr. Calhoun once expressed himself. I respectfully submit that there is no intermediate condition between a territory and a State; that a State whose federal relations are undefined is a State of which the Constitution of the United States knows nothing. Uncertain federal relations are no federal relations. Unless the State be in this Union the State is out of this Union. Unless the State be bound by the Constitution the State is independent of the Constitution. Unless the State have a right to be here represented the State has no right to be represented anywhere. It is a State under the Constitution, or it is a State independent. If, therefore, any proceeding create a State which does not simultaneously bring it within, and make it one of, the United States, that State may as well form an alliance with the incipient confederacy of Canada and New Brunswick as enter this confederacy. It may levy war against the United States, and you cannot punish its people for treason. It may appropriate the territory of the United States, and it is beyond your power. In a word, by the public law of the United States, all the territory within their jurisdiction is either a territory of the United States or a State of this Union.

If, then, that be the case, we are brought at once to the question of the relation of Congress to the territories in the formation of States. What are the respective parts belonging to the people of the Territory and to the Congress in the creation of a new State?

With the dogma of sovereignty I do not deal here. I leave that to the schools or to the gentlemen who meddle with metaphysical disquisitions. What sovereignty is I shall not attempt to define. The word is not used in our laws; it is not found among the wise words of our Constitution. It is the Will of the Wisp, which they who follow will find a treacherous guide through fens and bogs. We are not engaged in defining that "popular sovereignty" with which gentlemen on the other side have been so much plagued for the last year or two. Popular sovereignty is only a demagogue's name for the foundation principle of all our institutions. It is only a demagogue's name for the right of the people to govern themselves—not that popular sovereignty which is limited by, and springs from, an act of Congress—not that mushroom growth, bred in the hot-bed of political corruption as a dainty delicacy for the people's palate, under the sedulous care of my honorable friends opposite—which now that it is grown is found to be nothing but toad-stools, whereof the body politic is now sick—but that right of the people to govern themselves, recognized by the fundamental law as the very corner-stone of the Republic, which in this case the President violates and denies.

I here this day would deal in legal language; and in legal language there is such a thing as the people of the United States, of which the people of a territory form the subjects. And there is known in the law of the United States such a thing as the right of the people of a State to form their own government. And it is assumed that every State which can form, at any time, a part of these United States, shall have emanated spontaneously from the people, whose affairs it regulates, and shall have been received voluntarily into the United States by the authority of Congress.

Now, sir, what is the relation of Congress to the Territories? Have the Territories—I do not say any *natural* right, for I am not here upon a philosophical dissertation—have they any *legal* right to initiate proceedings to form a constitution? I do not ask whether they may not come here and ask, by petition, Congress to receive them, for that does not meet the difficulties of the case; but I ask whether the people of any Territory, by their simple volition, can meet in convention and assume to themselves such legal powers as shall compel Congress to recognise them as a legal body. Certainly those gentlemen who protested against the admission of California because there had been no preceding law, cannot maintain that proposition. Certainly gentlemen who voted against the Topeka constitution cannot maintain that proposition. Certainly the gentlemen who signed what purported to be a report of the committee of investigation of this House, cannot maintain that proposition. Certainly the President, who devoted a great part of his message to demonstrate that it is only through legal channels, by legal forms, and under legal authorities that a constitution could be formed, cannot maintain that proposition.

Neither can we, in point of sound sense and reason, maintain it, because that assumes there is a power in the people of some portions of the Territory not derived from the Constitution of the United States—since the Constitution says nothing upon the subject, except that Congress may admit new States. And if they have any inherent power, by the same reason they have all power; in other words, we are upon revolutionary ground, and not legal ground. It is to confound a right by law under the Constitution with the natural right mentioned in the Declaration of Independence, of people to alter and change their government to suit themselves. But we are not dealing with revolutionary, but with legal rights. We live and were born under the Constitution, and to us that is the ultimate criterion of legal rights; it is our embodiment of natural right in a living practical form of government; beyond it we recognise no natural right as a source of legal right, and he who cannot deduce his claim of right under it has none. I submit, therefore, that by the law of the United States the people of a Territory have no original right or authority to form a State government. No public man of position and character of any party has ever ventured to maintain such a proposition distinctly. The distinguished head of the State Department has fallen into expressions which seem to imply it; he has hastened to repel the inference, but, in his haste, has involved himself and his opinions in inexplicable perplexity and mystification, whence nothing can rescue him.

Then, if there be no inherent legal right in the people of a Territory to form a State government, how is it to be accomplished? They *must* form it; Congress cannot do it for them; yet Congress is the only legal authority, the only source of law for the Territories. Where then does it exist? I maintain that so far as legal authority is asserted of, or essential to, any proceeding for a convention, it must flow from Congress; because here only is any government over the Territories, in the eye of the law of the United States. The Supreme Court, which even State-rights gentlemen now-a-days regard as the ultimate arbiter upon all questions, has settled some other things besides the relation of slavery to the Territories; and among them it has settled that Congress alone governs the Territories—whether under the clause which authorizes them to make all needful rules and regulations for the Territory of the United States, or under some unwritten clause implied by the strict constructionists, it is needless here to inquire. It can flow from nowhere else, because a State, in the view of the Constitution of the United States, means a body of people within a particular Territory, and that Territory belongs to the people of the United States; and the people who live upon a particular portion of that territory have no right to assume to themselves, without our assent, any portion of it. A State involves the idea of a certain population inhabiting and possessing a certain Territory, and if the people cannot get the Territory without the assent of Congress, they cannot make themselves a State without the assent of Congress, nor take any steps towards it essential to its existence, which can exclude the control of Congress. Congress, it is true, cannot make a constitution for a Territory. It can only throw around the people of a Territory a legal protection, authorize them to proceed, and give them the guaranties of law in their proceedings; but beyond that I apprehend Congress can do nothing, and excepting Congress nobody can do that. What I wish here to maintain is, that that is the fundamental principle of all the legislation of Congress upon that subject. All the history of the Republic is in its favor; it has all authority in its favor; and there is no precedent which raises even a doubt against it.

Now, sir, I ask the attention of the Committee very briefly to the law—for I rose to-day to deal with the legal position of gentlemen on the other side. They have not been willing to enter the controversy with their opponents on the question of fraud in the formation of the constitution, or whether it be the fair and *bona fide* expression of the will of the people. They have insisted that these things were concealed from them by a screen of legal technicalities; and it is to tear down that screen that I now address myself.

In the absence, therefore, of any special act of Congress, authorising a convention, the *only* question is the construction of the Kansas-Nebraska act of 1854. Does *that* act confer on the Territorial Legislature power to call a convention to form a constitution?

There have been many States admitted into the Union, and under diverse circumstances, but much the greater number of them have been admitted under the express and precedent authority of laws of Congress. And, sir, you will perceive at once—if the authority can only come from Congress to take the initative steps—that it is immaterial whether that authority be contained in the organic act or in a special act. In either case it is our authority that they are exercising. In every instance they are our agents. In every instance they have only the authority that we give them. And, therefore, it comes exactly to the same thing, whether there was an enabling act to authorize the Territory to proceed to form a State constitution and government, or whether the authority was given under its organic act. This can never be a judicial question; but it is settled by every form of political authority. The States of Vermont, Kentucky, and Maine, and Texas have been admitted into the Union; but not as has been erroneously stated without precedent legislation. If it were so, it would not affect the argument; for they were never Territories of the United States. But the assumption is historically erroneous. Vermont went through the Revolution without any defined relations to the other colonies, claiming independence at the time of the revolution, under no colonial government; and, as a State, by its own inherent power, it acceded to and adopted the Constitution of the United States, exactly as the other States did. It is no case of the formation of a State out of a Territory of the United States. Texas was likewise an independent republic, acknowledged by the United States, and afterwards received into the Union. Kentucky proceeded under a law of the State of Virginia, whose Territory it then was, and on that authority formed its constitution, and was admitted into the Union. Maine proceeded under the authority of a law of Massachusetts, whose Territory it was, and by that means formed its State government and was admitted into the Union.

But the argument is irrevelant; for the question is not whether Congress *may* in its discretion recognise constitutions formed by the people *without* authority of law; but whether a Territorial Legislature was *in point of law* authority to legalise the election of a convention, to give the convention itself a *legal* existence, to vest *it* with *legal* power to bind not merely the *people* but the *Congress*. No one denies the power of Congress to admit Tennessee and Florida; yet no body ever asserted any legal validity in their proceedings before admission.

The language of the organic acts and the proceedings of Congress thereupon are decisive.

The Territories divide themselves into two great classes. In Ohio, Illinois, Indiana, Missouri, Mississippi, Alabama, Arkansas, and Tennessee, and Michigan, the Legislatures had "power to make laws in *all cases*, for the good government of the people of the said Territory not repugnant to or inconsistent with the Constitution and laws of the United States.

In Wisconsin, Minnesota, Oregon, Florida, Iowa, the power of the Legislatures were declared to extend—in the identical words of the Kansas Nebraska act—"to all rightful subjects of legislation not inconsistent with the Constitution and Laws of the United States.

Congress has construed *both* forms of expression by passing enabling acts for both classes. Not only for Ohio, Louisiana, Missouri, Mississippi, Alabama, Illinois, Indiana, but also for Wisconsin, Minnesota, and Oregon, did Congress pass acts specially *authorising* them to call a convention and form a State government; and, in every instance, excepting Wisconsin, these bills provided all the details of the convention, the number of delegates, its time of assembling, the modes under which the delegates should be elected. It is plain Congress thought the power "to make laws in all cases" necessarily extended it "*to all rightful subjects* of legislation." It is plain Congress thought neither form of expression authorised the temporary Territorial government to create a convention to form a constitution which would begin to operate only after the Territorial Legislature itself had ceased. Its power to govern was confined to the Territory—a tempory contrivance for a temporary purpose—involved in all the local interests and conflicts of territorial politics—and not safely to be intrusted with the providing for a constitution. In a word they were authorised to make laws to govern *the Territory*; but a law for a *constitution* was no law for governing a *Territory* at all.

The case is stronger under the Kansas act; for it reserves to Congress the power to make two or more States or Territories out of that Territory; and if Congress have the right to make *two* States, it is absurd to suppose it gave the Legislature power to make *one* State of it.

But there are cases of Territories which have spontaneously petitioned for admission under constitutions framed without an enabling act, and they are fruitful of authority.

The proceedings for the admission of Arkansas, Michigan, and Iowa—where there were no acts of Congress authorising conventions—are decisive.

The law admitting Arkansas declared *the boundaries of the State*. That, I suppose, establishes the fact that nobody then maintained that there was any authority in her constitution prior to her admission. The territorial limits of a State are essential to her existence; till they are defined there can be no State; after there is a State, Congress cannot determine its right of territory. On the territory depend the counties, the election districts, the judicial divisions, the apportionments of representation, the very people who are entitled to be heard on the adoption of the constitution.

If the Territorial law can authorize a convention which can adopt a constitution having any *legal* force prior to the recognition of Congress, it must have the right to define and appropriate the territory of the State it creates; and if it have not *this* power it cannot create a State in the eye of the law *at all*; for Congress may destroy its identity by taking away a half, or two-thirds, or *all* its Territory, and give it to another State.

Congress recognised the State of Michigan upon the condition that her people should accept the boundaries Congress prescribed; and on their acceptance only was Michigan admitted.

Iowa was declared to be admitted as a State, in 1845, under her constitution of 1844, Congress declaring her boundaries, and requiring the assent of her people to them. But in August, 1846, Congress prescribed by law *other* boundaries for Iowa, and by that law recognised the validity of the proceedings of the Legislature of the *Territory* of Iowa of the 17th of January, 1846, submitting the boundary between the *Territory* and Missouri to the Supreme Court; and finally in December, 1846, Congress declared Iowa admitted into the Union under a constitution formed in May, 1846, and with the boundaries of the law of 1846.

The case of Wisconsin is still more decisive. The Territorial legislative power extended to all proper subjects of legislation; yet Congress passed an enabling act, and in it defined the boundaries of the future State, on the 6th of August, 1846. The people formed a constitution on the 16th December, 1846, and Congress admitted the State on condition the people assented to other boundaries. Instead of merely assenting to the boundaries, they formed a new constitution on the 1st of February, 1848; and on their application were admitted as a State with the boundaries of the enabling act, on the 29th May, 1848.

These cases demonstrate that, whether a constitution be formed by the people, under or without an enabling act, the constitution has *no force of law*, over either person or Territory, till the final and complete admission of the State. Till her Senators and representatives are entitled to their seats, the Territorial authorities continue, the organic law is operative and supreme, the Territorial Legislature retains its legislative power, Congress can absolutely dispose of the Territory, assign its limits and exercise its discretion whether to admit the people as a State or to retain them as they are. In a word, these cases display the great fact lost sight of in this controversy, that till actual and final admission as a *State*, the constitution *is not a law*, it is merely a *proposition* which will become operative only when Congress recognises the existence of the State.

With reference to Michigan, a controversy arose in the Senate which elicited some salutary opinions. We have first of all the statement of his Excellency, the President, then in the Senate. When Michigan was applying for recognition, the exact question arose, whether there was a legal power in the Territorial Legislature to proceed, their powers being as I have stated them. Mr. Buchanan then said:

"We have pursued this course [that is to disregard informalities] in regard to Tennessee, to Arkansas, and even to Michigan. *No Senator will pretend that their Territorial Legislatures had any right whatever to pass laws enabling the people to elect delegates to a convention for the purpose of forming a State constitution. It was an act of usurpation on their part.*"

This was said in the hearing of the whole Senate, that *no Senator would contend* that they had legal authority, and he asserted that it was an act of usurpation! And, so far as the record shows, no man rose to controvert the authority of this distinguished expositor of Democratic doctrines of that day. Well, sir, that covers the three cases of proceedings by Territorial Legislatures without authority from Congress by special act. That destroys the whole argument which has been attempted to be founded upon them. With reference to Arkansas, I am protected by the authority of a name dear to the party which he founded. The Governor of that Territory applied to General Jackson to know whether the Territorial Legislature had any authority to pass an act for the purpose of taking the sense of the people on the subject of a State constitution. General Jackson took the opinion of his Attorney General, Mr. Butler; and the opinion of that distinguished lawyer, acquiesced in by the whole Administration, was, that there was no legal authority in the Territorial Legislature, but that it was beyond their temporary functions; that there was no authority inherent in the people, but that they were subordinate to the power of Congress, governed, as he says, under that clause of the Constitution which gives Congress power to make all needful rules and regulations for the territory of the United States. The new lights had not risen in their day. And as if no authority should be wanting, entitled to command respect with every division of the various opinions that are entertained now in this House, we have the further authority of a gentleman from whom, in many respects, it is my misfortune to have differed in political opinion, but who, in my judgment, was one of the ablest gentlemen that ever graced the councils of this country—more conservative, manly, and upright in his views, and convictions, and conduct, than almost any man of his party; always ready to sacrifice party allegiance upon the altar of truth; always following the dictates of an independent judgment, as well in his votes as in his reasoning, and, for that reason, justly the worshipped idol of the great Southern section of this country. I suppose, that the strict constructionist gentlemen of this House will not accuse me of any sympathy for dangerous dogmas from Federal quarters when I quote the authority of Mr. Calhoun:

"My opinion was," said he, "and still is, that the movement of the people of Michigan in forming for themselves a State constitution, without waiting for the assent of Congress, was revolutionary—"

What does the incumbent of the Executive chair say to that now? Why were not the military forces of the United States directed—instead of guarding and protecting the Lecompton convention, to turn them out, as they were directed to turn out the Topeka convention, equally illegal or equally legal?

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